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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 480

CHARLES S. GEORGE, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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September 10, 1964

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on June 12, 1964.

CITATION TO OPINION BELOW

The opinion of the United States Court of Claims (R. 30) is printed in Appendix A hereto, infra p. 1a.

JURISDICTION

The judgment of the United States Court of Claims was entered on June 12, 1964, (R. 30). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255(1).

QUESTION PRESENTED

Whether the failure to physically restore a civil service employee to his position after a ruling by the United States Civil Service Commission that his dismissal was procedurally defective and an order of restoration issued is a denial of administrative due process of law when the employee is again dismissed and is denied access to records and information to perfect his subsequent administrative appeal.

STATEMENT

Petitioner was employed by the Department of the Army as an attorney, Grade GS-12, and assigned to the Judge Advocate Division, Hq. Camp Drake, Tokyo, Japan at the time of his dismissal. On March 6, 1958, petitioner received reemployment leave orders to return to the United States for 60 days after having signed a new transportation agreement for return to Japan upon the termination of the leave. Without petitioner's knowledge, on the same date, March 6, 1958, a request was initiated by a Captain Thomas Y. Awalt requesting that petitioner's position be cancelled by way of a reduction-in-force. Under date of March 15, 1958, petitioner was transferred to the Judge Advocate Office at Camp Zama, a distance of approximately 30 miles from Tokyo, to perform the same duties as performed in Tokyo. On March 19, 1958, petitioner was appointed Claims Officer for the Camp Zama Area. By means of a Standard Form 50, Notification of Personnel Action, dated March 29, 1958, petitioner was advised that he *had* been involved in a mass change of personnel and that effective March 30, 1958, he was transferred from Hq. Camp Drake to Hq. Regional Camp Zama as an attorney. On April 16, 1958, peti-

tioner received a reduction-in-force notice dated April 15, 1958, which specified that petitioner was to be dismissed on May 19, 1958.. Pursuant to travel orders issued under date of April 22, 1958, and received by petitioner on April 24, 1958, petitioner left Camp Zama for return to the United States. Petitioner subsequently appealed his dismissal after returning to the United States and the United States Civil Service Commission by decision dated November 10, 1959, determined that his dismissal was procedurally invalid and ordered *retroactive restoration to duty.* Petitioner was never restored to his former post but in lieu of restoration the Personnel Office corrected the records to reflect a restoration on paper and subsequently paid petitioner the back pay to which he was entitled for this illegal dismissal. At the same time that the records were corrected to restore petitioner on paper a new reduction-in-force notice was issued under date of December 3, 1959, advising that petitioner was to be dismissed effective January 15, 1960. By letter dated January 22, 1960, petitioner protested his dismissal to the Director of Personnel in Camp Zama, Japan, which protest was not answered until March 4, 1960, when the Director of Personnel advised that petitioner's protest was denied and that the prior restoration of petitioner was a "paper" one and it did not require that petitioner be physically restored to duty. Subsequent to the receipt of said letter petitioner made numerous personal visits to the Pentagon seeking information on his appeal rights and information to perfect his appeal since petitioner was in the United States and the records he needed were in Japan. Petitioner received no satisfaction from the Agency and subsequently appealed to the Civil Service Commission which appeal was eventually denied for not having

been timely filed even though petitioner appealed that it was difficult to obtain records and information necessary for his appeal due to said records and information being physically in Japan and the petitioner was physically in the United States. Petitioner filed suit in the United States Court of Claims on March 27, 1961, which suit resulted in an adverse decision dated June 12, 1964, (R. 30).

REASONS FOR GRANTING THE WRIT

Petitioner was denied administrative due process of law and suffered the loss of a property right without due process of law. Herein the petitioner was dismissed which dismissal was later adjudicated to be illegal and ordered returned to duty by the Civil Service Commission. The Agency restored the petitioner on "paper" only and refused to physically return him to his position. Immediately after restoring petitioner on "paper" he was again ordered to be dismissed which dismissal has never been adjudicated on the merits due to the Agency's arbitrary refusal to physically restore the petitioner to his position. The Agency herein has denied the petitioner the right to have access to records by not restoring him physically to his position. The same refusal has denied the petitioner the right to be physically present to investigate all facts involving his dismissal. The sleight of hand actions of the Agency herein are the personnification of a sham to deprive a man of his job while apparently giving him appeal rights but denying him the tools with which to make such an appeal. The Agency herein was compelled under law to physically reinstate petitioner according to the ruling of the Civil Service Commission. In this regard see *Crocker* v. *United States*, 130 C. Cls. 567; *McGuire* v. *United States*, 145

C. Cls. 17; *Harris* v. *United States*, 149 C. Cls. 15, wherein it is reflected that there must be a good faith compliance on reinstatement. Reinstate means to return to a former status; *Gorski* v. *School District of Borough of Dickson City*, 113 A. 2d 334, 339. In *Barrows* v. *Riss & Co., Inc.*, 179 S.W. 2d 473, 475, the Court stated that to reinstate in connection with employment means to receive back into employment only or to put back into the same position or state from which removed. Again in the case of *Slettum* v. *Northern Pump Co., et al*, 30 N.W. 2d 708, 710 the word reinstate was defined to mean more than a mere rehiring. A fair interpretation of the word would be that the relator would be given back the job he left, on the same conditions and pay. In *State ex rel. Spurck* v. *Civil Service Board et al*, 32 N.W. 583, 587 the word reinstatement was interpreted to mean restoration of a discharged civil service employee to the position to which he was entitled at the time of discharge. In *Malara* v. *Monaghan*, 131 N.Y.S. 2d 270, 274 reinstatement was defined to mean the restoration to a state from which one has been removed. In *Berg* v. *Seaman*, 271 N.W. 924, 925, the Court stated that reinstatement means the complete restoration to a position from which one was removed and not merely restoration to the service of the state institution at which he was formerly employed. There is no interpretation of reinstatement other than to physically restore an employee once his dismissal was determined to be invalid. The failure to so do is an arbitrary and grossly erroneous decision so as to imply bad faith. *Knotts* v. *United States*, 128 C. Cls. 489. Herein the arbitrary refusal by the Agency to restore petitioner denied to him a right guaranteed under law . . . that of making an appeal of a dismissal. The Agency through ad-

ministrative fiat has wiped the protection of the Veterans' Preference Act from the books as applied to the petitioner. In a sense he was shanghaied from the arms of the law and cast adrift on the sea of lawlessness. He was not only denied employment by the dismissal action, he was denied access to records and information to make a proper appeal. The Civil Service Commission then compounded the heinous acts of Agency officials by denying petitioner an appeal because it was not filed timely. The Agency prevented a timely filing of the appeal by denying the petitioner the access to records and information to perfect such an appeal. This was done by their wanton disregard of the law and regulations in refusing to physically restore the petitioner to his position from which he was dismissed.

This Court has adopted a code of fairness in administrative proceedings as exemplied in the decision of *William* v. *Zuckert*, 371 U.S. 531, wherein the Court stated that the employee must be given a fair hearing. In the instant matter the Agency has conspired and contrived to deny the petitioner a hearing on his discharge. It has acted in a highanded arbitrary manner to deny the petitioner his property right without due process of law. The present matter is an abuse of administrative authority in its fullest bloom. In *Vitarelli* v. *Seaton*, 359 U.S. 535, this Court set forth the rigidity for an executive agency in following procedures for dismissal. An action as is involved herein is nothing more than a chipping away of protective guarantees decreed by legislation properly enacted. The chipping away of such laws by administrative officials reduces this nation to a nation of men rather than one of laws by which it was ordained. Herein an agency prevented an employee from having access

to records which could and would have aided him in the appeal of his dismissal. An administrative official of the Federal Government has thwarted the intent of Congress and the dictates of the Courts in order to achieve the dismissal of an employee. Such is arbitrary and capricious action at its best. Such is the denial of the protection of the law to which the employee is entitled. Such is the taking away of a property right without due process. To permit this action to stand is to permit a wanton disregard for the law to be perpetuated. Petitioner has been denied the rights guaranteed under law and regulation and the failure to correct this injustice reflects a disregard for the intent of Congress and an abuse of administrative discretion. All that the petitioner has been seeking is a physical return to duty to have access to records and information by which he could prove his dismissal invalid. Such has been denied the petitioner and he has been left without a job and the emoluments thereof without ever having been heard. He has had his pockets picked by administrative fiat without any recourse for such a dastardly act. In essence he has been denied administrative due process of law in order to take away a property right.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Washington, D. C. 20005

September 10, 1964

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 115-61

(Decided June 12, 1964)

CHARLES S. GEORGE

v.

THE UNITED STATES

John P. Witsil for plaintiff.

Manfred J. Schmidt, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before JONES, *Chief Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

OPINION

PER CURIAM: This case was referred pursuant to Rule 45 (since April 1, 1964, Rule 57) to Mastin G. White, a trial commissioner of this court, with directions to make findings of fact and recommendations for conclusions of law. The commissioner has done so in a report filed May 29, 1963. Briefs were filed by the parties, exception was filed by the plaintiff to the commissioner's opinion and recommendation for conclusion of law and the case was submitted to the court on oral argument of counsel. Since the court is in agreement with the findings of fact and recommendation of the trial commissioner, as hereinafter set forth, it hereby adopts the same as the basis for its judgment in this case. Plaintiff therefore, is not entitled to recover, and his petition is dismissed.

OPINION OF COMMISSIONER

On April 16, 1958, the plaintiff, who was then a civilian employee of the Department of the Army in Japan, received a reduction-in-force notice stating that he would be dis-

missed from the service on May 14, 1958. At about the same time that he received the notice, the plaintiff also received orders directing that he return to the United States. Under these orders, the plaintiff was to be in a duty status while traveling to his residence in the United States, and thereafter he was to be in a leave status until his dismissal from the service pursuant to the reduction-in-force notice.

The plaintiff returned to the United States in accordance with the orders mentioned in the preceding paragraph. He was in this country on May 14, 1958; and on that date, he was dismissed from the service of the Department of the Army pursuant to the reduction-in-force notice that he had received in Japan.

The plaintiff took an appeal to the Civil Service Commission with respect to his dismissal of May 14, 1958. In a decision dated November 10, 1959, the Commission held that the plaintiff's dismissal was invalid because the Department of the Army had failed to give him the required 30 days' advance notice of his prospective separation from the service.[1] The Commission directed that the plaintiff be restored to his position retroactively as of the day following the date of his dismissal.

After receiving the decision and directive of the Civil Service Commission, the Department of the Army on December 3, 1959, notified the plaintiff, who was still in the United States, that his prior dismissal had been canceled and that he was restored to his former position. The Department of the Army restored the plaintiff to the payroll and paid him all his back pay to which he was entitled. However, the Department of the Army did not transport the plaintiff back to Japan and actually reinstate him in the position from which he had been dismissed under the invalid

---

[1] This requirement was imposed by Section 14 of the Veterans' Preference Act of 1944 (58 Stat. 387, 390), as amended by the Act of August 4, 1947 (61 Stat. 723).

reduction-in-force proceedings in 1957; and although the Department of the Army restored the plaintiff to the payroll, it did not assign any duties to him in the United States. Instead, the Department of the Army on December 3, 1959, issued to the plaintiff a new "Notice of Separation Due to Reduction in Force," stating that he would be separated from the service effective January 15, 1960.

The plaintiff was separated from the service by the Department of the Army a second time on January 15, 1960. He was paid his salary up to and including that date.

On April 29, 1960, the plaintiff addressed to the Civil Service Commission a communication in the nature of an appeal respecting his separation from the service on January 15, 1960. However, his appeal was ultimately rejected by the Commission on the ground that it had not been taken within 10 calendar days after the effective date (January 15, 1960) of the reduction-in-force notice dated December 3, 1959.[2]

It appears that the present action could appropriately be dismissed on the ground that the plaintiff failed to take timely advantage of the administrative remedy that was available to him by way of an appeal to the Civil Service Commission from his dismissal of January 15, 1960. *Myers* v. *Bethlehem Corporation*, 303 U.S. 41, 50-51 (1938); *United States* v. *Blair*, 321 U.S. 730, 735-737 (1944); *United States* v. *Holpuch Co.*, 328 U.S. 234, 239-240 (1946). It is not necessary, however, to base the disposition of the case solely upon this ground.

The petition indicates that the plaintiff's claim is based upon the fact that, after his dismissal of May 14, 1958, and the subsequent proceedings before the Civil Service Commission, the Department of the Army "failed to physically restore plaintiff to his position as directed by the US Civil

[2] Such a time limitation on appeals to the Civil Service Commission was prescribed by 5 CFR, 1960 Pocket Supp., 20.9(a).

Service Commission in its decision of November 10, 1959." The plaintiff's counsel has not filed any brief for the consideration of the commissioner and the petition does not articulate his legal theory with clarity. However, the action is evidently based upon the theory that since the Civil Service Commission in its decision of November 10, 1959, directed the Department of the Army to restore the plaintiff to his position, and since Section 19 of the Veterans' Preference Act of 1944 (58 Stat. 387, 391), as amended by the Act of June 22, 1948 (62 Stat. 575), provided in part "That any recommendation by the Civil Service Commission, submitted to any Federal agency, on the basis of the appeal of any preference eligible, employee or former employee, shall be complied with by such agency," the Department of the Army was under a legal duty to transport the plaintiff to Japan and reassign to him the duties that he had been performing in Japan as of the time when he received the 1958 reduction-in-force notice.

Even if it is assumed for the purpose of this discussion that the Department of the Army was under such a legal duty, the plaintiff still has not shown any entitlement to a recovery in the present case, because he has not shown that he sustained any financial loss because of the failure of the Department of the Army to discharge its legal obligation. *Willems Industries, Inc.* v. *United States*, Ct. Cl. No. 397-56, decided November 1, 1961, p. 15 of slip copy; *Wright* v. *Brush*, 115 F. 2d 265, 267 (10th Cir., 1940). The plaintiff was restored to the payroll by the Department of the Army pursuant to the decision and directive of the Civil Service Commission; and he not only received all the back pay to which he was entitled, but he also received his salary thereafter so long as he remained in the service. The fact that the plaintiff was physically in the United States and not working while receiving his salary subsequent to his restoration to the payroll, instead of actually working in Japan, would not entitle the plaintiff to a monetary judgment against the United States.

The petition does not allege, and there is no evidence in the record to prove, that the plaintiff's second separation from the service on January 15, 1960, pursuant to the reduction-in-force notice of December 3, 1959, was invalid or irregular in any way. In the absence of clear evidence to the contrary, it must be presumed that the officials of the Department of the Army acted properly in effecting the plaintiff's separation from the service on January 15, 1960. *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926); *Slavitt* v. *United States*, Ct. Cl. No. 205-55, decided December 6, 1961, p. 6 of slip copy.

The petition makes the bare assertion that the "failure to physically restore plaintiff to his position denied him access to all the records necessary to file his second appeal when he was again dismissed on January 15, 1960." However, the petition does not state, and there is no evidence to show, what records the plaintiff would have had access to in Japan that he could not arrange to examine in the United States, or in what way the access to such additional records (if any) would have enabled him to avoid the separation from the service on January 15, 1960, pursuant to the reduction-in-force notice dated December 3, 1959. As this court said many years ago in the case of *Field* v. *United States*, 16 Ct. Cl. 343, 450 (1880), a claimant must prove his case, and if he fails to sustain the burden of proof that is upon him, the fault or the misfortune is his own, and he must abide the consequences.

In my opinion, the plaintiff has not shown that he is entitled to recover. Accordingly, I recommend that the petition be dismissed.

FINDINGS OF FACT

1. The plaintiff, a civilian, was employed by the Department of the Army and was assigned to the Judge Advocate Division, Headquarters, Camp Drake, Tokyo, Japan, when on April 16, 1958, he received a reduction-in-force notice

bearing the date of April 15, 1958, and specifying that he would be dismissed on May 14, 1958.

2. The plaintiff was, in fact, dismissed on May 14, 1958, pursuant to the notice mentioned in finding 1. At that time, the plaintiff was in the United States in a leave status, having returned pursuant to orders under which he was in a duty status while traveling to his residence and thereafter in a leave status.

3. Subsequently, the plaintiff appealed his dismissal of May 14, 1958, to the United States Civil Service Commission.

4. The Civil Service Commission, in a decision dated November 10, 1959, directed that the plaintiff be restored to his position retroactively as of the day following the date of his dismissal. The basis of the Commission's decision was the failure of the Department of the Army to give the plaintiff the required full 30 days' advance notice of his separation from the service.

5. By a letter dated December 3, 1959, the plaintiff was advised by C. A. Blefett, Jr., Civilian Personnel Officer of the 6th Logistical Command in Japan, that his prior dismissal action had been canceled and that he was restored to his former position in accordance with the decision of the Civil Service Commission.

6. The plaintiff was not physically returned to Japan in connection with his restoration referred to in finding 5. He remained in the United States.

7. The plaintiff was subsequently paid the back pay to which he was entitled for the period of his unlawful separation, and such amount is not in dispute.

8. Under the date of December 3, 1959, the Civilian Personnel Officer of the 6th Logistical Command sent a "Notice of Separation Due to Reduction in Force" to the plain-

tiff in Washington, D. C. This notice stated in part as follows:

1. This is to advise you that due to the abolishment of the position which you occupy, your separation by reduction in force is required. Reduction in force regulations which gives [sic] full consideration to veteran preference, civil service tenure, length of federal service, and work performance have been followed in selecting employees to be affected because of the abolishment of position. The retention register indicates your retention standing is as follows:

a. Title, Grade & Salary:	Attorney-Advisor (General), Z-2934 GS-970-12x, $9,770.00 per annum
b. Competitive Area:	USARJ
c. Competitive Level:	ZCL-12-57
d. Retention Sub-Group:	I A

2. Unless reassignment to an available position can be effected, your active service as a Department of the Army Civilian employee will be terminated effective 15 January 1960. During the first ten (10) work days of the notice period, which begins 11 December 1959, you will be in an active duty status, unless annual leave or leave without pay is granted at your request. For the balance of notice period, you will be placed on annual leave. Accumulated annual leave not to exceed 45 leave days, or annual leave that you had to your credit at the beginning of the leave year, whichever is greater, will be paid for in a lump sum with your final salary check. In the event you have annual leave to your credit in excess of this amount, the excess annual leave should be used prior to the above separation date, unless your services are required. You have been on the rolls in a duty status from 20 May 1958 through 11 December 1959.

3. Inasmuch as you are in the excepted service, you have reassignment rights to any position of the same or lower grade in your competitive area for which you are fully qualified, and which is either vacant, occupied by an employee in a lower retention subgroup, or occupied by an employee with lower retention standing in the same subgroup if the position is the same (or essentially the same) as one from which you have been promoted. It has been determined that there is no position available which could be offered to you.

4. Civil Service rules and regulations governing reduction-in-force, and the retention registers and records affecting your case, will be available in the Office of the Civilian Personnel Officer, Headquarters U. S. Army Japan and 6th Logistical Command, APO 343, for your inspection at any time during this notice period. You may write to the Civilian Personnel Officer if you have any questions pertaining to this action. If after inspection of these records, you feel that your rights have been violated, you have the right to file an appeal under the Department of the Army grievance procedures, or you may appeal direct to the Manager, Branch Office, United States Civil Service Commission, Federal Building, Honolulu 2, Hawaii, any time from date of receipt of this notice up to but not later than ten (10) calendar days after the effective date of the action. • • •

5. It is requested that you acknowledge receipt of this letter by completing the attached USARJ Form 1218, and returning it to this office within three (3) workdays from date of receipt of this notice.

9. The plaintiff was separated from the service effective January 15, 1960, pursuant to the notice referred to in findin 8.

10. The plaintiff continued to receive his pay up to and including January 15, 1960. There is no controversy with

respect to any amount of pay due the plaintiff as of or prior to that date.

11. On January 22, 1960, the plaintiff responded to the notice that is set out in finding 8. He stated in part as follows:

> In as much as I was not returned to Japan pursuant to the decision of the Commission, notification that I began "active duty" there on 11 December 1959 is meaning less [sic]. This is a paper transaction of some sort which does not constitute restoration to the position. Rather than compliance it appears to be a circumvention of the decision of the Commission. • • •
>
> Paragraph 5 of your letter relates to a new separation notice which proposes adverse action. In order to protect my rights in the matter it will be necessary to see the retention register and records affecting the case, and I am requesting these documents from you. I do not know what the USARJ competitive area is. I do not know [what] competitive level ZCL-12-57 is. Am I competing with the GS-12 attorneys in the Yokohama area? • • •

12. Under the date of March 4, 1960, the Civilian Personnel Director of the 6th Logistical Command wrote a letter to the plaintiff, stating in part as follows:

> Inasmuch as no position existed to which you could have been physically restored in Japan, this requirement was fulfilled by "paper" restoration, effective 11 December 1959, and a new reduction-in-force action was processed. To help you understand your relative standing in the action, a copy of the retention register is enclosed. This register reflects all the Attorney-Advisor, GS-12 positions in existence, as of the date the action was taken, within the United States Army Japan competitive area. A competitive level consists of all positions within a competitive area which are

sufficiently alike in duties, responsibilities, pay systems, and grade that the incumbent of any one of them could be moved to any other without undue interruption to the work. United States Army Japan competitive area includes all Army installations within Japan (including Yokohama) with the exception of US Army Audit Agency, US Army Command Reconnaissance Activity, Pacific Military Advisory Assistance Group, Japan, and the US Army Logistical Depot, Japan, all of which are in separate competitive areas by themselves. There are no other positions in existence at a lower grade within the excepted service to which reassignment could have been offered.

13. On April 29, 1960, the plaintiff addressed to the Board of Appeals and Review, Civil Service Commission, a communication in the nature of an appeal respecting his separation from the service on January 15, 1960. The plaintiff stated (among other things) that "It is the conclusion of appellant that he was illegally discharged by the Government and has not been legally reinstated"; and he requested "that the separation action of Jan. 15, 1960 be cancelled and the appellant ordered restored to active duty and pay status retroactive to the date of separation."

14. On May 11, 1960, the Chairman of the Board of Appeals and Review, Civil Service Commission, responded to the plaintiff's communication of April 29, 1960 (see finding 13), and stated in part as follows:

> Compliance with the Board's decision on your appeal from the reduction-in-force effective May 14, 1960 [sic], was accomplished by the agency through cancellation, as instructed by the Board, of the Notifications of Personnel Action in your case dated April 23, October 27, and November 28, 1959. This restoration did not render you immune from further action by reduction in force, nor did it require that you be

transported back to Japan, particularly as it developed that you were issued a new notice proposing separation within 30 days of the issuance of the Board's decision, and effective January 15, 1960, you were separated under the notice. In this connection, it is noted that the provision of the Retention Preference Regulations cited in your letter is not a current provision.

• • • • •

You also indicated in your letter that you desire to appeal to the Commission in the matter of the reduction-in-force action by which you were affected on January 15, 1960. The period prescribed for filing a reduction-in-force appeal expired ten calendar days after the effective date of that action. If you nevertheless wish to pursue the matter with the Commission, your appeal should be submitted in writing to the Manager, Branch Office, U. S. Civil Service Commission, Federal Building, Honolulu 2, Hawaii, together with evidence that circumstances beyond your control prevented you from filing the appeal within the prescribed period.

15. On May 18, 1960, the plaintiff addressed a communication to the manager of the Civil Service Commission's branch office in Honolulu, Hawaii, stating in part as follows:

Reference is made to an appeal, dated April 29, 1960, submitted by undersigned to the U. S. Civil Service Commission, copy of which is attached and which is incorporated in this appeal.

• • • • •

Any appeal must, of necessity, be based on a full understanding of the facts and records affecting the case and here such information was available at the Office of the Civilian Personnel Officer, USARJ, "for your inspection at any time during this notice period."

In other words what the Notice of December 3, 1959 says is simply this, "if you so desire, stop at our office, pay your own expenses to Camp Zama, Japan, and we'll hear you and show records, but get here before Jan. 15, 1960". The office in question is over 7000 miles from where the appellant is located and it was quite impossible for him to take advantage of this grudging concession.

These are circumstances of essential information not available and beyond the control of appellant which delayed filing this appeal.

16. On May 23, 1960, the manager of the Civil Service Commission's branch office in Honolulu, Hawaii, wrote a letter to the plaintiff, stating in part as follows:

With reference to your desire to appeal from the reduction-in-force action effective January 15, 1960, as you were advised by the Board of Appeals & Review, U.S. Civil Service Commission, Washington, D.C., in its letter of May 11, 1960, appeals of this nature must be filed not later than 10 calendar days after the effective date of the action. This time limit may not be extended unless the employee establishes that he was not notified of the applicable time limit and was not otherwise aware of the limit, or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit. It is noted that the reduction-in-force notice dated December 3, 1959, to be effective January 15, 1960, specifically advised you that any appeal to the Commission should be filed not later than 10 calendar days after the effective date of the action.

You are hereby offered an opportunity to submit such statement as you may desire as to the reasons why you feel your appeal should not be denied on the ground that it was not filed within the time limit provided by

regulation. If a reply to this letter is not received within 10 days from this date, namely June 2, 1960, your appeal can receive no further consideration.

17. On May 28, 1960, the plaintiff wrote a letter to the manager of the Civil Service Commission's branch office in Honolulu, Hawaii, and stated in part as follows:

> In regard to the ten day appeal period referred to in your letter of May 23, 1960 this limitation was made in contemplation of normal conditions where an appellant has ready access to records and documents upon which to base an appeal. As pointed out in letter of May 18, 1960 such conditions did not prevail in the case under consideration. Under circumstances beyond appellant's control agency official delayed until March 4, 1960 the mailing of essential documents pertaining to the case and after receipt it was noted appellant was placed on a register and in a competitive level where he could not compete with other attorneys of the same grade in the local commuting area who have less service.

18. On June 2, 1960, the manager of the Civil Service Commission's branch office in Honolulu, Hawaii, wrote a letter to the plaintiff, stating in part as follows:

> It is noted that your first reference to an appeal from this action was dated April 29, 1960, approximately three months after expiration of the time limit placed on such appeals, namely, not later than ten days following the effective date of the action, and that it was addressed to the U.S. Civil Service Commission, Board of Appeals and Review, Washington, D.C. The agency's reduction-in-force notice to you specifically advised you of your right of appeal to this office and of the established time limit for filing such an appeal.
>
> You indicated in your letter of May 28, 1960 that the reason for your failure to file within the required time

limit was because your agency "delayed until March 4, 1960 the mailing of essential documents pertaining to the case * * *." In this connection, it is noted that your letter to Headquarters, U.S. Army, Japan requesting these "essential documents" was not sent until January 22, 1960, which was seven days after the effective date of the reduction-in-force action and only three days prior to the expiration of the ten-day period established for the filing of appeals before the Commission in such cases. It is further noted that although Headquarters, U.S. Army, Japan replied to your request for this specific information on March 4, 1960, your first letter regarding your desire to appeal the action was not forwarded to the Commission until April 29, 1960. Furthermore, the Board of Appeals and Review's reply to your letter was dated May 11, 1960 and your appeal to this office was not dated until May 18, 1960.

It is the opinion of this office that the foregoing clearly establishes that you have not acted on a timely basis in connection with the various aspects of your case and that the information furnished this office by you fails to establish that circumstances beyond your control prevented you from filing an appeal with the Commission within the time limit of ten days following the effective date of the reduction in force. This appeal is, therefore, denied on the grounds that it was not filed within the time limit provided by regulation.

19. On June 8, 1960, the plaintiff wrote a letter to the Board of Appeals and Review, Civil Service Commission, appealing from the adverse action of the Commission's branch office in Honolulu, Hawaii. The appeal stated in part as follows:

As stated in previous correspondence, appellant was not restored to active duty. The procedure invoked by the agency official was not followed; appellant was en-

titled to a good faith compliance with the procedure, and, in the absence of same, undoubtedly, his rights have been violated.

20. On July 26, 1960, the Chairman of the Board of Appeals and Review, Civil Service Commission, wrote to the plaintiff, and stated in part as follows:

> With regard to the timeliness of your appeal from your reduction-in-force separation of January 15, 1960, the Board has fully considered the prior record pertinent to this matter, including the representations which you submitted to the Honolulu Branch Office concerning the delayed filing of your appeal. The record shows that in the reduction-in-force notice issued to you under date of December 3, 1959, you were properly and fully advised of your right to file an appeal with the Commission at any time after your receipt of the notice and within ten calendar days after the effective date of the action. Under date of January 22, 1960, you requested that your agency furnish you with certain documents and information pertinent to your case, and the agency's response was mailed to you on March 4, 1960. Although some delay may be indicated in the date of the agency's response to your request, the record also shows that you unde. ook no further action in the matter until April 29, 1960, on which date you submitted your initial appeal from your January 15 separation. That appeal was misdirected to the Board of Appeals and Review. Following the Board's information letter of May 11, 1960, you properly directed your new appeal to the Honolulu Branch Office, in accord with the Board's advice to you.
>
> In view of the record establishing that you were properly informed relative to the procedure for filing timely appeal to the Civil Service Commission, and in the absence of a showing that your appeal was delayed by circumstances beyond your control, the Board

can find no basis for accepting your late appeal. Under the circumstances, the Board of Appeals and Review affirms the previous decision of the Twelfth Region's Honolulu Branch Office, rejecting your appeal as untimely filed.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover, and the petition is therefore dismissed.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 480

CHARLES S. GEORGE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner was a civilian employee of the Department of the Army assigned to duty in Japan (Pet. App. 5a). On April 16, 1958, he received a reduction-in-force notice, advising him that he would be separated on May 14, 1958 (Pet. App. 5a-6a). Shortly thereafter he returned to the United States under orders, where he remained in a leave status until, in accordance with the reduction-in-force notice, he was dismissed (Pet. App. 6a).

Petitioner appealed to the Civil Service Commission, which, on November 10, 1959, ruled that the dismissal was procedurally invalid because petitioner

had not been given the full 30 days' advance notice of separation required by Section 14 of the Veterans Preference Act, 5 U.S.C. 863 (*ibid.*). The Commission directed that petitioner be reinstated as of the date following his dismissal (*ibid.*).

On December 3, 1959, petitioner was notified of his reinstatement and was subsequently given back pay for the entire period of his unlawful separation (*ibid.*). Also on December 3, the Army sent petitioner a second reduction-in-force notice, pursuant to which he was again separated on January 15, 1960 (Pet. App. 6a-7a). During the period between his reinstatement and the second separation, petitioner remained in the United States (Pet. App. 6a).

Despite the fact that the December 3 reduction-in-force notice advised petitioner of his right to appeal either under the Army grievance procedures or to the manager of the Civil Service Commission Branch Office in Honolulu "any time * * * up to but not later than ten (10) calendar days after the effective date of the action" (Pet. App. 8a), petitioner did not do so. It was not until April 29, 1960—more than three months after his separation—that petitioner sent a letter to the Commission, addressed to the Chairman of the Board of Appeals and Review rather than to the Honolulu Branch Office Manager, alleging that the separation was invalid (Pet. App. 10a).[1]

[1] The only action taken by petitioner within the prescribed appeal period was to request certain documents from the Civilian Personnel Director. These documents were sent to him on March 4, 1960, almost two months before petitioner attempted to appeal to the Civil Service Commission (Pet. App. 9a-10a).

The Civil Service Commission rejected the appeal on the ground that it was untimely (Pet. App. 15a-16a), and petitioner thereupon instituted this suit in the Court of Claims. In that court, petitioner asserted that his second separation was invalid because the Army had not physically restored him to his former position in Japan when the Civil Service Commission determined that the first dismissal was procedurally defective.

Adopting the findings and recommendations of the trial commissioner, the Court of Claims dismissed the action (Pet. App. 1a). In his opinion, the commissioner noted that the suit "could appropriately be dismissed" because of petitioner's failure to pursue timely his administrative remedy (Pet. App. 3a). Choosing, however, not "to base the disposition of the case solely upon this ground" (*ibid.*), the commissioner went on to determine that, even assuming the Army had been under a legal obligation to return petitioner to Japan and to reassign him to his former duties there, the failure to do so had not prejudiced petitioner (Pet. App. 4a-5a).

2. The decision below is clearly correct and presents no question of general importance requiring review by this Court.

a. In view of petitioner's undisputed failure to prosecute a timely administrative appeal, there was no occasion for the court even to entertain his attack upon his second separation. The time limitation on appeals from notices of reduction-in-force is provided in the Commission's regulations, which are not challenged by petitioner. 5 C.F.R. (1960 Pocket Supp.)

20.9(a). That limitation was expressly called to petitioner's attention in the reduction-in-force notice (Pet. App. 8a). Petitioner, a lawyer, does not contend that he did not understand the advice contained in the notice respecting his right of appeal. Nor, as the Civil Service Commission pointed out in rejecting his untimely appeal (Pet. App. 14a, 15a), did petitioner establish circumstances beyond his control which precluded him from observing the 10-day time limit.[2]

b. In any event, there is no merit to petitioner's insistence that his second separation was invalid because he was not returned to Japan.

As the Army explained to petitioner, he was not returned to Japan because his position had been abolished; *i.e.*, there was no existing position in that country to which he could be restored (Pet. App. 9a). Petitioner points to no statute or regulation which requires an agency to restore the employee physically to a position which no longer exists. Plainly, the Army fulfilled its obligation to petitioner when it restored him to the rolls, paid him the full amount to which he was entitled for the period of his unlawful separation, and then gave him the thirty

[2] Petitioner asserts (Pet. p. 6) that a timely appeal was precluded by the refusal of the Army to permit him access to "records and information" which he needed to perfect his appeal. This claim is baseless. Apart from the fact that he was not refused access to any documents he had requested, there was nothing to prevent him from filing his appeal within the time limit and then taking steps to obtain those records and other information, if any, which he may have deemed relevant to the propriety of his reduction-in-force.

days' notice of reduction-in-force which the Veterans Preference Act requires.

Nor was petitioner prejudiced by the failure to return him to Japan. While petitioner claims (Pet. pp. 4, 6) that he was thereby denied access to records essential to the prosecution of his appeal, he has never indicated what those records are or what bearing they might have on his reduction-in-force. In this connection, it is to be noted that petitioner took advantage of his right, referred to in the second reduction-in-force notice (Pet. App. 8a), to inspect "the retention registers and records affecting [his] case." Upon his request, the Civilian Personnel Director sent petitioner a copy of the retention register (Pet. App. 9a). Thereafter, petitioner acknowledged that the register was the "essential" document "pertaining to the case" (Pet. App. 13a).

For these reasons, we respectfully submit that the petition should be denied.

ARCHIBALD COX,
Solicitor General.

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